

ORIGINAL

DOCKET FILE COPY ORIGINAL
RECEIVED

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

(NOV 24 1993)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

PP Docket No. 93-253

REPLY COMMENTS OF LOCATE, INC.

Local Area Telecommunications, Inc. ("LOCATE"), by its undersigned counsel, hereby submits its reply comments in the above-referenced proceeding. LOCATE is the nation's largest provider of common-carrier digital microwave services. Since 1983, LOCATE has provided high-quality digital microwave data, voice and video services to large customers with sophisticated telecommunications needs. Currently, LOCATE provides digital microwave T-1 type services utilizing facilities at over 85 locations in the New York City metropolitan area. LOCATE's subsidiary, Personal Communications Services of New York, Inc., has been actively involved in the development of PCS.

**I. Competitive Bidding Should Not Apply to
Point-to-Point Microwave Radio Services**

In the Notice of Proposed Rulemaking ("NPRM"), the FCC proposes to apply the competitive bidding rules to new applications for the point-to-point common carrier microwave services, including intermediate links. The comments filed in

No. of Copies rec'd
List ABCDE

049

response to the Commission's proposal demonstrate that auctioning these frequencies will not serve the public interest and is beyond the mandate of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act").

A. Intermediate Links Should Not Be Subject to Competitive Bidding

In the NPRM, the Commission proposes to license all common carrier microwave facilities by competitive bidding, including those used for intermediate links. LOCATE concurs with Congressman Dingell and the comments of AT&T, BellSouth, California Microwave, Southwestern Bell and Sprint Corporation that the Budget Act's mandate for competitive bidding rules is inapplicable to intermediate microwave links used by cellular and other common carriers. LOCATE further agrees with California Microwave that "[a] consistent interpretation of section 309(j)(2)(A) would apply competitive bidding rules only to the licensing of the spectrum that is directly providing the end-user or mobile link to and from subscribers." California Microwave Comments at 4. Congressman Dingell has advised the Commission that Congress used the term directly "to distinguish between those who subscribe to spectrum-based services and others whose use of the spectrum is incidental to some other service."

Point-to-point microwave links fail to meet the statutory prerequisite for competitive bidding. Intermediate links do not involve the receipt by or transmission of signals directly by subscribers. California Microwave Comments at 3. AT&T appropriately identified the carrier as the user of the

intermediate link, not the subscriber, "the carrier provides and maintains access to both ends of the radio transmission and is responsible for integrating the radio transmission into the entire communications path." AT&T at 22.

Microwave facilities used to provide intermediate links are provided to a single subscriber, namely, the network provider and are "private" internal facilities. California Microwave Comments at 4. Southwestern Bell properly states that the microwave frequencies used as intermediate links are not accessible by subscribers. Southwestern Bell at 8. In this instance, the subscriber does not operate the microwave transmitter. Accordingly, the specific, limited use of these frequencies take them outside the parameters of the Budget Act.

B. The Budget Act Requires the Use of Engineering Solutions

The Budget Act requires that the Commission not abandon engineering solutions to spectrum allocation issues in its urgency to use competitive bidding. Specifically, the Budget Act directs the FCC to continue to honor its obligation to use engineering solutions, negotiation, threshold qualification, service regulations, and other means to avoid mutually exclusive applications and licensing proceedings. Numerous commentors cite the value and efficiency of the prior coordination procedures used by the FCC in licensing microwave facilities. These procedures have reduced to an oddity the number of mutually exclusive applications. Commentors agree that this engineering-

dependent process rather than competitive bidding is the appropriate process for awarding microwave licenses.

Furthermore, commentors that utilize microwave facilities in their networks have identified practical barriers to the successful use of competitive bidding to award future common carrier point-to-point microwave licenses. Sprint believes it is "unworkable and unreasonable to bid each leg of internal communication microwave circuits used for network point-to-point communication even when the user is a LEC, IXC or a mobile service provider. Point-to-point microwave links are network components of telecommunications companies." Sprint at 22. Southwestern Bell believes that use of competitive bidding to license intermediate links would impede a carrier's ability to efficiently maintain its network in a least-cost manner and deprive carriers of the ability to estimate build-out costs for continuing to provide end-to-end service. Southwestern Bell at 8-9. These practical difficulties as well as the absence of direct subscriber use of the frequencies require that these links not be awarded by competitive bidding.

C. The Budget Act Mandates Competitive Bidding Only For Services with Multiple Subscribers

Point-to-point microwave facilities often are used to serve a single subscriber. This dedicated network configuration does not meet the statutory pre-conditions for competitive bidding set forth in the Budget Act. The Budget Act, by its terms, directs competitive bidding only for those services for which there are multiple subscribers:

the principal use of that spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee:

(i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or

(2) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate.

LOCATE commonly offers and installs dedicated microwave links to serve a single subscriber and to meet that particular customer's unique communications needs. That single customer is the only subscriber to transmit or receive communications on the frequencies licensed to LOCATE. This limited and specific service offering, in contrast to a wide based service offering such as PCS, is not subject to competitive bidding under the Budget Act.

II. If Competitive Bidding Is Used to License Common Carrier Point-to-Point Microwave Services, Speculators Will Be Fueled to Apply For Licenses as A Competitive Threat

Common carrier point-to-point microwave licenses currently are processed using a prior coordination process that is efficient and yields valuable use of the spectrum. This process also reduces the number of applications that are mutually exclusive. The transition to a competitive bidding system for awarding common carrier point-to-point microwave licenses would delay the process in a number of ways and increase the work of the Commission without any substantial benefit.

First, the NPRM proposes a general competitive bidding process that is appropriate for new services such as PCS but not appropriate for existing services that are licensed on a per link basis. The NPRM does not specify how the competitive bidding rules will award individual licenses for a particular link. The process of announcing a filing window or deadline for filing to bid in an auction for a single license does not work for a applicant seeking a license for a single link in response to a particular customer need.

Second, triggering an auction by the filing of an application that has been coordinated will merely fuel the filing of mutually exclusive applications by competitors that do not have a good faith interest in obtaining the license. By filing a mutually exclusive application, a competitor could force the prospective licensee to bid for its license to merely delay the process and stall deployment of the competitor's facilities. The competitive applicant could later underbid the initial applicant and only risk loss of the application fee. California Microwave raised similar concerns in its comments. California Microwave Comments at 5 (auctioning these frequencies could create speculative incentives for others to file mutually exclusive applications just to create an auction opportunity.)

LOCATE often competes directly in the market for access services with other carriers. These carriers do not use microwave or spectrum-dependent transmission facilities but rather use landline transmission facilities such as fiber optics.

Accordingly these carriers are not subject to competitive bidding or the costs now associated with purchasing spectrum.

By filing a mutually exclusive application, competitors could delay LOCATE's ability to obtain a common carrier microwave license and deliver services to its customer. As stated by BellSouth, the auction process could become a competitive weapon: "direct and indirect competitive licenses could file mutually exclusive applications and then bid up the costs of these links at auction to create higher capital requirements on others."

BellSouth at 45-46. MCI raised a similar anti-competitive concern in its comments: "the Commission should weigh carefully the prospect that competitive bidding would invite speculative and strike applications in this service, thereby increasing administrative burdens and delays which would outweigh any incremental revenue gain." MCI at 22; see also Sprint at 22 (competing applicant could file with intent to obtain a settlement from a legitimate applicant.)

III. The Upfront Payment of 2¢ Per MHz/Pop Should Not Be Applied to Common Carrier Point-to-Point Microwave Licenses

The methodology for calculating the upfront payment for PCS and possibly other services at 2¢ per MHz/per Pop is not appropriate for the common carrier point-to-point microwave service. This formula could easily result in the upfront payment exceeding the bid price and could unnecessarily deter the efficient use of microwave links. For example, the upfront payment for a 20 MHz link in New York City (assuming 15 million pops) would be \$6 million. This upfront payment would not be recoverable for

service revenues that are nominal compared to the magnitude of the upfront payment.

In addition, the proposed upfront payment methodology imposes a significant geographical disparity on the required payment based on the population even if the microwave link will be used to serve a limited number of customers or a single subscriber. For example, in the New York City metropolitan area, LOCATE could be forced to pay an upfront payment that bears no relation to the scope of the service to be provided. Accordingly, if the Commission decides to apply the competitive bidding rules to point-to-point microwave services, the Commission should adopt a methodology for calculating an upfront payment that is not spectrum or population dependent.

Respectfully submitted,

Stuart Dolgin 1ss

Stuart Dolgin, General Counsel
LOCAL AREA TELECOMMUNICATIONS, INC.
17 Battery Place
Suite 1200
New York, New York 10004
(212) 509-5115

Of Counsel:
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

November 24, 1993

120813.1